PP

v.

MUHAMAD SUHAIMI ABDUL AZIZ

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
ARIFFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
[CRIMINAL APPEAL NO: W-05-39-2001]
12 DECEMBER 2003

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Murder of wife - Defence of insanity - Lack of motive - Whether indicative of insanity - Medical evidence - Accused suffering from delusional disorder of the jealousy type - Whether defence must succeed - Penal Code, ss. 84, 302*

CRIMINAL PROCEDURE: *Defence - Insanity - Charge of murder - Whether evidence properly evaluated by trial judge - Medical evidence - Finding of insanity - Whether medical evidence unreasoned and deficient - Penal Code, ss. 84, 302*

This was an appeal against the decision of the learned judge acquitting the accused on a charge of murder on the ground of insanity under s. 84 of the Penal Code. The finding *inter alia* was premised on the unchallenged evidence of the medical expert ('DW2') that the accused, at the material time, was suffering from a delusional disorder of the jealousy type and had no knowledge that what he was doing was wrong in law. Before the appellate court, the prosecution argued that the learned judge had committed an error of law for: (i) failing to properly evaluate the evidence of the medical expert as against the other evidence before the court; and (ii) failing to consider that the opinion of the expert was an unreasoned opinion.

Held:
Per Ariffin Zakaria JCA

[1] DW2's medical finding on the accused was made after conducting the necessary observations and interviews for three months not only on the accused but also with members of his family, the deceased's family and their friends. DW2 had clearly stated that the finding was based on the interviews and the intensive observation, and that, as for the observation, she had examined the accused's behaviour, his sleep pattern and also his

emotions. It is therefore incorrect to say that there were no facts disclosed by DW2 in her evidence to support her finding. On the contrary, ample materials were before the court to support such a finding. (p 390 a-e)

[2] The grounds of judgment showed that the learned judge had considered the other evidence apart from the medical evidence. One crucial finding made by the learned judge was that the accused was not driven by any motive in killing his wife. Lack of motive is undoubtedly a factor that goes to support the defence of insanity. Thus in the absence of any rational motive on the part of the accused in killing his wife, coupled with the unchallenged medical evidence, the learned judge was justified in coming to his conclusion. (pp 390 f & 391 d-e)

[3] Considering all the evidence, the accused had successfully proved on a balance of probabilities that he was suffering from insanity at the material time. (p 392 a)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif hakim kerana membebaskan tertuduh dari tuduhan bunuh atas alasan hilang akal di bawah s. 84 Kanun Keseksaan. Keputusan tersebut antara lain dibuat berasaskan keterangan pakar perubatan ('DW2') yang tidak dicabar bahawa tertuduh, pada waktu material, mengidap penyakit 'delusional disorder of the jealousy type' dan tidak mengetahui bahawa apa yang dilakukannya adalah salah di sisi undang-undang. Di hadapan mahkamah yang dirayu, pendakwa berhujah bahawa yang arif hakim telah silap di sisi undang-undang kerana: (i) gagal menilai keterangan pakar perubatan secara teratur berbanding keterangan-keterangan lain yang ada di hadapan mahkamah; dan (ii) gagal mempertimbang bahawa pendapat pakar tersebut adalah pendapat yang tidak disokong oleh alasan-alasan.

Diputuskan:
Oleh Ariffin Zakaria HMR

[1] Laporan perubatan DW2 terhadap tertuduh disediakan setelah di buat pemerhatian dan temuduga selama tiga bulan bukan sahaja ke atas tertuduh tetapi juga ke atas ahli-ahli keluarganya, keluarga si mati dan sahabat-sahabat handai mereka. DW2 dengan jelas berkata bahawa dapatannya itu adalah berdasarkan temuduga dan pemerhatian yang intensif, dan bahawa, berkaitan dengan pemerhatian, beliau telah meneliti tingkah laku tertuduh,

corak tidurnya dan juga emosi-emosinya. Oleh itu adalah tidak benar untuk mengatakan bahawa DW2 tidak mengemukan apa-apa fakta dalam keterangannya bagi menyokong dapatannya. Sebaliknya, terdapat banyak bahan di hadapan mahkamah bagi menyokong dapatan sedemikian.

[2] Alasan-alasan penghakiman menunjukkan bahawa selain dari keterangan perubatan yang arif hakim juga telah mempertimbang keterangan-keterangan lain. Satu dapatan penting yang dibuat oleh yang arif hakim adalah bahawa tertuduh tidak dipengaruhi oleh apa-apa motif dalam membunuh isterinya. Ketiadaan motif tentunya adalah satu faktor yang menyokong pembelaan hilang akal. Oleh yang demikian, dengan ketiadaan apa-apa motif rasional di pihak tertuduh untuk membunuh isterinya, ditambah dengan keterangan perubatan yang tidak dicabar, keputusan yang arif hakim adalah wajar.

[3] Mengambilkira semua keterangan, tertuduh telah membuktikan atas imbangan kebarangkalian bahawa beliau telah hilang akal pada waktu material.

Rayuan ditolak.]

Case(s) referred to:
Chua Hwa Soon v. PP [1998] 2 SLR 22 ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaran Pillai [1997] 2 CLJ 153 FC ***(refd)***
PP v. Mishah Saad [1998] 1 CLJ 759 HC ***(refd)***
PP v. Zainal Abidin Mat Zaid [1993] 1 CLJ 147 HC ***(refd)***
R v. Byrne [1960] 2 QB 396 ***(refd)***
R v. Turner [1975] 1 All ER 70 ***(refd)***
Rex v. Howe 2 MC 109 ***(refd)***
Sek Kim Wah v. PP [1988] 1 MLJ 348 ***(refd)***
Sim Ah Song & Anor v. Rex [1951] 17 MLJ 150 ***(refd)***
Walton v. The Queen [1978] All ER 542 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Yeo Ah Seong v. PP [1967] 1 MLJ 231 ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***
Zahari Yeop Basri & Anor v. PP [1980] 1 MLJ 160 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 32(1)
Penal Code, ss. 84, 302

For the appellant - Mohd Yusoff Zainal Abidin DPP
For the respondent - Alias Abdullah; M/s Wringglesworth & Co

JUDGMENT

Ariffin Zakaria JCA:

This is an appeal by the prosecution against the decision of the learned High Court judge in acquitting the accused on the charge of murder on the ground of insanity and ordering the accused to be kept in safe custody in Hospital Bahagia, Ulu Kinta pending an order from DYMM Yang di-Pertuan Agong.

The accused was charged under s. 302 of the Penal Code with the murder of his wife, Faizah binti Arshad (Faizah), on 25 September 1999 at about 3pm at house No. 40, Lorong Setiapuspa I, Bukit Damansara, Kuala Lumpur ("the said house"). He claimed trial to the charge. A total of eight witnesses were called for the prosecution.

The facts as found by the learned judge are briefly as follows. At the material time the accused, Faizah and their three children named Muhamad Fariz, Sarah (PW7) and Muhamad Shafik were living at the said house. A Thai maid named Yawahe Waelateh was also staying with them.

Sarah (PW7), who was then eight years old, was called to give evidence for the prosecution. She gave an unsworn statement on what transpired on that fateful afternoon. Her narration of the incident is as follows:

> Pada 25.9.99 jam lebihkurang 3.30 petang saya ingat saya ada menelefon kepada nenek saya. Saya ingat apa yang saya cakap kepada nenek saya. Saya cakap pada nenek saya: Mama sudah mati, abah buat. Sebelum saya telefon nenek saya, saya sedang menjaga adik saya yang sedang tidur. Pada masa itu saya nampak bapa saya tendang pintu bilik air. Saya dengar mama saya menjerit. Masa itu mama saya ada di dalam bilik air. Kemudian saya kejut kakak iaitu Kakak Ramlah. Saya nampak abah saya keluar dari bilik air. Masa itu saya lihat baju dan tapak kaki abah berdarah. Selepas itu baru saya telefon nenek saya. Sebelum telefon nenek saya ada cakap dengan jiran. Saya cakap dengan jiran selepas saya telefon nenek saya. Saya tak ingat warna baju yang dipakai oleh ayah saya.

The first adult who came to know of the grisly incident was the Thai maid, who could not now be traced. Her statement to the police was, however, admitted by the learned judge under s. 32(1) of the Evidence Act 1950, the material parts of which was reproduced in the judgment of the learned judge. It reads as follows:

> Pada jam tiga petang lebih semasa saya sedang tidur di bilik tersebut telah dikejutkan oleh Sarah di mana dia pada masa tersebut dalam keadaan menangis dan berkata 'Kakak tolong mama dalam bilik air dengan abah'. Saya kemudian bangun dan keluar. Saya kemudian menjengok ke dalam bilik air yang pintunya separuh terbuka, pada ketika tersebut saya lihat Muhamad

Suhaimi sedang mengadap ke bahagian dalam bilik air dan simati juga berada dalam bilik air tersebut. Di tangan Muhamad Suhaimi pula saya lihat ada pegang sebilah pisau. Saya juga ada dengar suara simati dari bilik air tetapi tidak tahu apa yang dikatakan. Apabila melihat keadaan tersebut, saya merasa takut dan lari keluar ke sebelah rumah jiran dan menyorok di sebalik sebuah kereta. Selepas lebih kurang 5 minit kemudian, semasa saya sedang menyorok di kereta tersebut saya lihat Muhamad Suhaimi keluar dengan memandu keretanya warna perak (silver) dengan laju dan keluar dari lorong tersebut dan menghilangkan diri. Saya kemudian masuk dan dapati ketiga-tiga anak mereka masih berada di dalam rumah dan Sarah dan Syafiz dalam keadaan menangis. Saya kemudian pergi ke arah bilik air dan melihat ke dalam bilik air tersebut dapati simati sedang tertiarap dengan keadaan berlumuran darah dan tangan simati masih bergerak. Saya juga lihat ada sebilah pisau dalam keadaan berlumuran darah berdekatan kaki kanan simati dalam bilik air tersebut. Saya kemudian menyuruh Sarah menelefon nenek dia di Kluang dan Sarah telah menelefon neneknya di Kluang. Pada masa tersebut, saya dengar Sarah cakap "Wan! Mama dah mati, abah yang buat". Selepas itu telefon diletakkan. Tidak berapa lama kemudian telefon berdering semula dan Sarah menjawab dan kemudian memberikan kepada saya di mana dia menyatakan atuknya yang mahu cakap dengan saya.

The forensic pathologist, Dr. Ong Beng Beng, who conducted the post-mortem examination on the deceased in his report (P3) stated that there were 26 incised and stab wounds on her body. From his examination at the scene he concluded that the deceased was killed inside the bathroom.

According to Inspector Koh Jok Tian (PW5), the investigation officer for this case, on 27 September 1999 he received information that the accused was involved in a road accident at kilometer 121 Jalan Kuantan – Trengganu. As a result of the accident the accused was admitted to Hospital Kemaman.

At the close of prosecution's case the court was satisfied that the prosecution had made out a *prima facie* case against the accused and the court then called upon the accused to enter his defence. Two witnesses were called for the defence, namely, the accused himself and Rabaiah binti Mohd. Salleh (DW2), a psychiatrist attached to Hospital Bahagia, Ulu Kinta.

The accused gave evidence on oath. His testimony was brief. In essence he said on the day in question he was in the house together with his family. He was seated at the dining table. He was feeling depressed. His mind was full of negative thoughts. He was smoking cigarette one after another. He heard voices telling to him to do something to the deceased. He said it was taking control over him. After that he remembered going to the bathroom and breaking down the door. He could not remember what happened after that. Finally he remembered getting out of the house and getting into his car. In cross-

examination, which was equally brief, he reiterated that he could not remember the fact that on the day of the incident he entered the toilet and incessantly stabbed the deceased until she succumbed to her death.

DW2, in her evidence, stated that she received the accused as her patient. Accordingly she conducted a mental examination on the accused which comprised the following:

> temubual-temubual yang kerap, pemeriksaan makmal dan juga dari pemerhatian segala perbuatan dan tingkahlaku beliau semasa bersama kami.

She had also interviewed members of the families of both the accused and the deceased and their office colleagues. Further, she held discussions with the Pengarah Hospital Bahagia and the other psychiatrists for a second opinion. Her diagnosis of the accused was as follows:

> Hasil daripada pemeriksaan diagnose yang saya telah berikan ialah Muhd. Sulaimi ada menghidap sejenis penyakit psikotik yang dinamakan delusional disorder. Delusional disorder ialah sejenis penyakit dan psikotik. It is of the jealous type. Delusional disorder itu ada kurang-kurang 4 kategori iaitu persecutory, grandiose, erotomanic type and jealous type and mixed type. Kes ini diberi diagnosa delusional disorder jealous type. Kesimpulan yang telah saya buat selepas pemeriksaan yang rapi dan intensive saya berpendapat bahawa semasa kejadian beliau di dalam keadaan yang tidak waras. Di masa kejadian beliau di dalam keadaan yang tidak waras dan tidak tahu bahawa perbuatan beliau itu adalah salah dari segi undang.

Under cross-examination she stated that the symptoms indicative of mental psychotic illness are as follows:

> Antara symptoms yang menandakan adanya penyakit mental/psikotik yang saya telah perolehi ialah suara-suara ghaib (auditory hallucinations), visul hallucinations. Daripda situ timbulnya delusion di mana beliau percaya bahawa arwah isterinya telah berlaku curang. Suara-suara ghaib adalah apa yang Muhd. Suhaimi beritahu kepada saya. Dan juga dari temubual saya dengan keluarga En. Suhaimi.

The learned judge posed two fundamental questions to DW2. Firstly, whether it is possible to ascertain a person's mental condition after a lapse of 1 1/2 years from the date of the incident, to which she answered in the positive. Secondly, whether it is possible to distinguish between malingerers from a genuine one. She replied by saying that it is quite easy for a psychiatrist to identify a malingerer and she added that she is absolutely positive that the accused was not a malingerer. No medical evidence in rebuttal was called for the prosecution.

Based on the evidence before him the learned judge came to his finding that the defence had, on the balance of probabilities, succeeded in raising the defence of insanity under s. 84 of the Penal Code. The section provides:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.

It is settled law that the defence of insanity under s. 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v. Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *PP v. Mishah bt. Saad* [1998] 1 CLJ 759.

The learned judge correctly stated the burden and standard of proof to be discharged by the accused when a defence of insanity is raised by an accused person. In his grounds of judgment he said:

> It is settled law that where an accused person raises the defence of insanity the burden of proof will be on him (see *Juraimi bin Hussein v. PP* [1998] 2 CLJ 383; *PP v. Ismail bin Ibrahim* [1998] 2 CLJ 213; *Jusoh v. PP* [1963] MLJ 84). The standard of proof to be discharged by the accused is on a balance of probabilities (see *Rajagopal v. PP* [1977] 1 MLJ 6; *PP v. Nageswari* [1994] 4 CLJ 419; *PP v. Jong Chin Chin* [1995] 4 MLJ 300.

Before us, the finding of the learned judge was attacked by the prosecution on a number of grounds. The main thrust of the prosecution's argument was premised on the principle that in law it is a question for the judge to decide, taking into consideration the medical evidence before him, whether the accused had made out a defence of insanity or not. The court is not bound by the medical evidence. The court needs to consider the medical evidence in the light of all the evidence before the court and to decide for itself whether the other evidence would support the medical evidence. In support the learned Deputy Public Prosecutor (the learned deputy) referred us to the Singapore case of *Chua Hwa Soon Jimmy v. PP* [1998] 2 SLR 22 which is the decision of the Singapore court of appeal. In that case the defence of diminished responsibility was raised by the accused. Yong Pung How CJ after considering *R v. Byrne* [1960] 2 QB 396 at p. 30 stated his view on the weight that the court ought to give to medical evidence in the following terms:

Whether the accused was at the time of the killing suffering from any abnormality of mind in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is, no doubt, important, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence, if there is other material before them which in their good judgment conflicts with it and outweighs it.

The aetiology of the abnormality of mind (namely, whether it arise from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence.

Assuming that the jury are satisfied on a balance of probabilities, that the accused was suffering from 'abnormality of mind' from one of the causes specified in the parenthesis of the subsection, the crucial question nevertheless arises was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing. This is a question of degree and essentially one for the jury. Medical evidence is of course relevant but the question involves a decision not merely as to whether there was some impairment but whether such impairment can be properly be called 'substantial', a matter upon which juries may legitimately differ from doctors.

Furthermore, in a case where the abnormality of mind is one which affects the accused's self-control the step between 'he did not resist his impulse' and 'he could not resist his impulse' is … one which is incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses. These problems which in the present state of medical knowledge are scientifically insoluble the jury can only approach in a broad commonsense way. This court has repeatedly approved directions to the jury which … indicate that such abnormality as 'substantially impairs his mental responsibility' involves a mental state which in popular language (not that of the M'Naughten Rules) a jury would regard as amounting to partial insanity or being on the border line of insanity (emphasis is ours).

We were further referred to the observation of Lord Keith in *Walton v. The Queen* [1978] All ER 542 where at p. 545 he stated:

It was argued by counsel for the appellant that, in the light of the uncontradicted medical evidence to the effect that the appellant suffered from an abnormality of mind which substantially impaired his mental responsibility for his acts, the jury was bound to accept that the defence of diminished responsibility has been established, and that the trial judge should have so directed them. He relied on *R v. Matheson* and *R v. Bailey*. In the first of

these cases the accused, who had a long recorded history of conduct indicative of mental abnormality, had killed a 15-year-old boy under peculiarly revolting circumstances. Three medical witnesses testified at the trial that they were satisfied that the accused's mind was so abnormal as substantially to impair his mental responsibility, giving their reasons for that view, and no medical evidence was led in rebuttal. The jury returned a verdict of guilty of murder. The Court of Criminal Appeal squashed that verdict and substituted one of manslaughter. Lord Goddard CJ, delivering the judgment of the court, having referred to the medical evidence said:

> What then were the facts or circumstances which would justify a jury in coming to a conclusion contrary to the unchallenged evidence of these gentlemen. While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court would not, and indeed could not, disturb their verdict, but if the doctor's evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence.'

After considering other circumstances of the case Lord Goddard CJ continued:

> If then there is unchallenged evidence that there is abnormality of mind and consequent substantial impairment of mental responsibility and no facts or circumstances appear that can displace or throw doubt on the evidence it seems to the court that we are bound to say that a verdict of murder is unsupported by the evidence.

In *Sek Kim Wah v. PP* [1988] 1 MLJ 348 Wee Chong Chin CJ went so far as saying that even if the medical opinion is unchallenged, the trial judge is free to reject or differ from the medical opinion if there are other facts on which they would do so.

The learned deputy further submitted that a bare statement of the medical doctor without more is not sufficient to support the defence of insanity. In support of this contention he cited the case *R v. Turner* [1975] 1 All ER 70 where at p. 73 Lawton LJ, stated:

> Before a court can assess the value of an opinion it must know the facts on which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has ormitted to consider relevant ones, the opinion is likely to be valueless. In our judgement counsel calling an expert should in examination in chief ask his witness to state the facts on which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination.

This view also found support in the case of *Sim Ah Song & Anor v. Rex* [1951] 17 MLJ 150 where Brown, Ag. CJ stated:

> The responsibility for the determination of this question, as in the case of every question upon which expert evidence is called, rested upon the Court and not upon the expert. The business of an expert witness is to draw upon the store of his knowledge and experience in order to explain some matter which his experience should qualify him to understand. He is quite entitled to express his opinion, which indeed is the natural corollary of his explanation. But a bare expression of his opinion has no evidential value at all. Unless he gives an explanation which supplies the understanding of the subject which the Court lacks, the Court is in no better position than it was before to determine the question which it is its duty to determine, and if the Court acts upon a bare expression of the expert's opinion the determination of the question becomes that of the expert and not of the Court.

Raja Azlan Shah CJ (Malaya) (as his Highness then was) in *Wong Swee Chin v. PP* [1981] 1 MLJ 212 put the task of a tribunal of fact in relation to an expert witness in the following words:

> In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion. Therefore the nature of DW2's evidence must be examined in the light of the above principles. We see nowhere in the records to suggest that the trial judge had incorrectly or improperly evaluated the evidence of DW2.

(See also the observation of Anuar CJ (Malaya) in the *Dr. Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153).

The legal principle that may be distilled from the authorities is that the role of an expert witness is merely to assist the court in arriving at its decision. In the final analysis the court is the final arbiter and not the expert. As a necessary corollary in giving his opinion the expert needs to give his reasons. A bare statement of opinion of an expert would not suffice.

In the present case the learned deputy contended that the learned judge committed an error of law firstly, in failing to properly evaluate the evidence of the medical expert as against the other evidence before the court and secondly, the expert in this case in giving her opinion did not provide any reason to support it. This the learned deputy contended is a serious deficiency in the testimony of the expert which the learned judge failed to consider.

Before we proceed further we should remind ourselves of the position of the appellate court where the judgment under appeal is based on the findings of the facts by the trial judge. The right approach to be taken by the appellate court is as expressed by Edgar Jospeh Jr. SCJ in *Yusoff bin Kassim v. PP* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376:

> Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and heard the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities. (See for example, *Khoo Sit Hoh & Ors. v. Lim Thean Tong*.) An appellate court can, therefore, in appropriate cases, act upon its own view of the conflicting evidence. (See *Goghlan v. Cumberland* and *Bigsby v. Dickinson*).

The evidence for the defence in this case was that of the accused himself and the medical evidence of DW2. The accused in his evidence briefly stated that:

> On the 25th September 1999 I was at my house. I was seated at the dining table. I was feeling very, very depressed. My mind was full of negative thoughts. I was smoking one cigarette after another trying to think what is going on in my thoughts. It was like taking over my mind. It was taking over control of me. I remember going to the bathroom and breaking down the door. Then I don't know what happened. I remember getting out of the house and getting into my car. That is all.

And in the cross-examination he stated that:

> Saya tidak tahu bahawa pada hari kejadian saya ada memasuki dalam bilik air dan telah menikam isteri saya bertubi-tubi sehingga beliau meninggal.

On 6 February 2001, that is about 1 1/2 years later, the accused was referred to DW2 for medical examination. DW2 testified that she conducted mental examination on the accused which included interviews, laboratory examination and observations of the accused. She came to the conclusion that the accused was suffering from a delusional disorder of the jealous type; she said:

> Delusional disorder ialah sejenis penyakit dan psikotik. It is of the jealous type. Delusional disorder itu ada kurang-kurang 4 kategori iaitu persecutory, grandiose, erotomanic type and jealous type and mixed type. Kes ini dberi diagnosa delusional disorder jealous type. Kesimpulan yang telah saya buat selepas pemeriksaan yang rapi dan intensive saya berpendapat bahawa semasa kejadian beliau di dalam keadaan yang tidak waras. Di masa kejadian beliau di dalam keadaan tidak waras dan tidak tahu bahawa perbuatan beliau adalah salah dari segi undang-undang.

In cross examination she went on to state the symptoms normally associated with this kind of delusional disorder in the following words; *viz*:

> Antara symptoms yang menandakan adanya penyakit mental/psikotik yang saya telah perolehi ialah suara-suara ghaib (auditory hallucinations), visul hallucinations. Daripda situ timbulnya delusion di mana beliau percaya bahawa arwah isterinya telah berlaku curang. Suara-suara ghaib adalah apa yang Muhd. Suhaimi beritahu kepada saya. Dan juga dari temubual saya dengan keluarga En. Suhaimi.

The learned deputy contended that the evidence of DW2 suffered from the following defects which the learned judge failed to consider. Firstly DW2 in her testimony merely stated that she conducted an observation on the accused but did not state what was the nature of the observation she made on the accused. She also failed to disclose the contents of the interviews that she conducted on the accused. It was also not put in evidence as to whether the accused had any history of mental disorder. Relying on *R. v. Turner (supra)* the learned deputy contended that it is incumbent on the defence to elicit these facts from the expert so as to enable the court to properly assess the value of the expert's opinion. He also submitted that it is not for the prosecution to elicit these facts by cross-examination.

Further, he contended that the learned judge erred in his finding in failing to take into consideration the following facts namely, the conduct of the accused after the incident and the items that were recovered from him when he was arrested in Trengganu two days after the incident. He pointed out that from the statement of the Thai maid, it is clear that after the incident, the accused was seen leaving his house in his car. He was also seen speeding. It was not disputed that when the accused was eventually arrested in Trengganu, among the items recovered from him included, the sum of RM1,300, one US 50 dollar note, one US 1 dollar note, two pairs of shoes, two jeans and four T-shirts. Further, he pointed out the defence completely failed to explain what happened to the accused between 25 September 1999 to 27 September 1999.

The learned deputy argued that had the learned trial judge considered all these facts and the deficiencies in the evidence of DW2, he would not have come to the decision that he did in this case. In conclusion, he submitted, considering the totality of the evidence before the court, the accused failed to establish the defence of insanity under s. 84 of the Penal Code.

Firstly, on the evidence of the expert, DW2, we do not think it is opened to the criticisms as urged upon us by the prosecution. From the evidence of DW2 it is clear that her medical finding on the accused was made after conducting the necessary observations and after conducting interviews not only on the accused but also with the members of his family, the deceased's family members and their friends. It is true that not all the observations and the contents of the interviews were put in evidence, but in the cross-examination DW2 did mention about the interviews which she conducted on the accused. In the course of the interview she said the accused told her of auditory hallucination; she said:

> Daripada situ timbulnya delusion di mana beliau percaya bahawa arwah isterinya telah berlaku curang. Suara-suara ghaib adalah apa yang Mohd. Suhaimi beritahu kepada saya. Dan juga dari temubual saya dengan keluarga Encik Suhaimi.

On the question put to her by the learned judge, *viz*, whether her finding is essentially based on her interviews, she stated that it is the interviews plus intensive observation for three months. For observation, she told the court, they look at his behaviour, his sleep pattern and his emotions. It is, therefore, incorrect to say that there were no facts disclosed by DW2 in her evidence to support her finding. On the contrary, we find, there are ample materials before the court to support such a finding.

The other criticism levelled at the judgment of the learned judge is that he failed to consider other evidence, apart from the medical evidence, in coming to his finding. With respect to the learned deputy, again we find his contention wholly unjustified. Upon close scrutiny of the grounds of judgment it is clear that the learned judge had in fact done so. This is reflected in the following passage of the judgment which reads:

> In the absence of any medical evidence being led by the prosecution to challenge the testimony of DW2 it is my duty to ascertain whether the other evidence on record is sufficient to render the medical evidence led by the defence untenable. It must be noted that the evidence led by the prosecution was the minimum necessary to hold that a *prima facie* case had been made out. No evidence was led by the prosecution to explain the circumstances that led to the killing of Faizah. Exhibit R12 reveals that the morning of 25 September 1999 in the household of the accused passed by as it would in any other home. The accused and Faizah were not working on that day. Faizah got up in the morning and prepared the breakfast. After breakfast she went shopping with one of her children and Yawahe Waelateh leaving behind the accused with the other two children. They returned home at about 9.00 a.m. Faizah then went to the kitchen to prepare lunch. At about 1.00 p.m. the

> family had lunch. They then watched television in the hall. Yawahe Waelateh who joined the familiy at about 2.00 p.m. then went to the room which was adjacent to the bathroom to have a nap. She was then alerted of the incident by PW7 at about 3.00 p.m. She also said that the relationship between the accused and Faizah was good. Even though she had seen Faizah crying she did not know the reason for it. However, she had never seen the accused and Faizah quarrelling even on the day of the incident. No other evidence was led by the prosecution to cast aspersions on the relationship between the two. Evidence of animosity between the two, if any, could have been elicited from PW4 and PW7 which was not done. It must therefore be taken to mean, on the available evidence, that the relationship between the accused and Faizah was good. The evidence on record also shows that the atmosphere in the home of the accused up to about one hour prior to the incident was normal. In the circumstances I am compelled to conclude that the accused had absolutely no motive in killing Faizah indicating that his act was abnormal.

One crucial finding made by the learned judge was that the accused was not driven by any motive in killing his wife. Lack of motive is, undoubtedly, a factor which goes to support the defence of insanity. As observed by Barakbah LP in *Yeo Ah Seong v. PP* [1967] 1 MLJ 231 at p. 233:

> Again, although motive is not an ingredient in the offence of murder, the jury's attention should have been drawn to the fact that lack of motive was an important indication of insanity.

Thus, in the absence of any rational motive on the part of the accused in killing his wife coupled with the unchallenged medical evidence, we hold that the learned judge was justified in coming to his decision.

On the personal items recovered from the accused, the evidence on record showed that they were recovered from the accused by SP8 when the accused was admitted to the Emergency Unit, Hospital Kemaman. These items were subsequently handed over to Chief Inspector Ali Hanafiah bin Hashim (SP6). It is to be noted that no question was put to the accused on this matter by either the prosecution or the defence. In the circumstances, we do not see how this piece of evidence could have any material bearing on the final outcome of the case.

One other interesting feature in this case is the glaring omission by both the prosecution and the defence to lead evidence on what had happened to the accused from the time he was seen leaving the house at 3.30pm on 25 September 1999 until he was admitted to Hospital Kemaman. The learned deputy contended that it is for the defence to explain to the court what had happened to the accused during this period. The absence of any explanation he contended cast a serious doubt on the defence case. It may be that the

absence of such an explanation may cast some doubt on the defence case. But, the question is whether considering all the evidence available, the accused had successfully proved on the balance of probabilities that he was suffering from insanity at the material time. We agree with the learned trial judge that he had succeeded in doing so.

There is one other point. The learned deputy had urged upon us that in the event the court is not with him in this appeal then, in all fairness, this court ought to order a retrial. With respect, we could not accede to the application of the learned deputy for the following reasons. Under s. 316 of the Criminal Procedure Code no doubt the appellate courts have a discretion, in appropriate cases, to order retrials. The issue is whether it is just in the circumstances of the present case for this court to make such an order. For guidance we would refer to the observation of Lord Morrison CJ, in *Rex v. Howe* 2 MC 109, at p. 110 which was cited with approval by Hashim Yeop A. Sani J (as he then was) in *Zahari bin Yeop Basri & Anor v. PP* [1980] 1 MLJ 160 which reads:

> I have grave doubt whether the power to order a re-trial is intended to be exercised in cases where the prosecution have entirely through their own fault, failed to present their case properly. If I complied with this petition, it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason, that the prosecution had not used all their available armoury in launching the first prosecution.

In the present case we are of the view that the fault lies wholly with the prosecution in failing to call medical evidence in rebuttal. Therefore, in the circumstances we think it is unjust to order the accused to be retried. To allow such an application would be tantamount to allowing the prosecution to have a second bite at the proverbial cherry.

For the above reasons the appeal by the prosecution is hereby dismissed and the order of the learned judge is accordingly affirmed.